

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court Docket No. 149040

vs

Court of Appeals Docket No. 314890

MANTREASE DATRELL DEQUAN SMART,

Lower Court No. 11-29652-FC

Defendant-Appellee.

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BRIEF IN OPPOSITION TO
APPLICATION FOR LEAVE TO APPEAL

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JURISDICTIONAL STATEMENT

Defendant agrees with the Plaintiff's jurisdictional statement.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Were the statements made by the Defendant on June 8, 2011 made in the course of plea discussions and should they be suppressed from evidence under MRE 410(4)?

Defendant-Appellee would answer "yes."

Plaintiff-Appellant would answer "no."

The Court of Appeals would answer “yes.”

The trial court would answer “yes.”

2. Was the Defendant in custody when the June 8, 2011 statement was made and should the statement be suppressed because he was not advised of his rights pursuant to *Miranda v Arizona*?

Defendant-Appellee would answer “yes.”

Plaintiff-Appellant would answer “no.”

The Court of Appeals declined to answer this question.

The trial court would answer “yes.”

STATEMENT OF APPLICABLE STANDARDS OF REVIEW

The applicable standards are set forth in the argument portion of this brief.

STATEMENT OF FACTS

The Plaintiff's statement of facts is complete and accurate and will be supplemented in the Argument portion of this brief where necessary.

ARGUMENT

- I. THE STATEMENTS MADE BY THE DEFENDANT ON JUNE 8, 2011 WERE MADE IN THE COURSE OF PLEA DISCUSSIONS AND SHOULD BE SUPPRESSED FROM EVIDENCE UNDER MRE 410(4).

Standard of Review: A trial court's ultimate decision on a motion to suppress evidence is reviewed de novo. *People v Chowdhury*, 285 Mich App 509, 514; 775 NW2d 845 (2009). The question of whether an individual was subject to custodial interrogation, and thus entitled to warnings under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), is a mixed question of law and fact; the trial court's findings of fact are reviewed for clear error but questions of law are reviewed de novo. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). Factual findings will only be disturbed if the appellate court is left with "a definite and firm conviction that a mistake was made." *People v Brown*, 279 Mich App 116, 127; 755 NW2d 664 (2008).

The Defendant made statements to Sergeant Mitch Brown of the Flint police department on two separate occasions, March 15, 2011, and June 8, 2011. The prosecutor is not disputing that the March 15, 2011 statement should be suppressed from evidence.

MRE 410 provides that statements made in the course of plea discussions are not admissible against the defendant:

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

* * * *

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

The Court of Appeals explicitly declined to decide whether “in the course of plea discussions with an attorney for the prosecuting authority” means that the physical presence of an assistant prosecutor during plea discussions is required by MRE 410. The prosecutor had conceded that the March 15, 2011 statement was inadmissible and has consistently only sought to admit the June 8, 2011 statement. MRE 410 does not explicitly require the physical presence of a prosecuting attorney. As the Court of Appeals majority pointed out, there was no assistant prosecutor present at either session. *People v Smart*, ___ Mich App ___; ___ NW2d ___ (2014) [Docket No. 314980, 2/11/14], slip op 3. The dissenting judge, Judge Wilder, said that while [*People v Smart*, supra, slip op, dissent, 7]

... under the plain language of [MRE 410], only a statement made by a defendant in the progress or process of plea discussions with an attorney for the prosecuting authority would be excluded from evidence. The fact that an attorney for the prosecuting authority is not present when the statement is made is not dispositive as to the question whether MRE 410(4) is applicable.

The prosecutor has in his application for leave to appeal with the Supreme Court conceded that “Both the majority and Judge Wilder [dissenting judge] found that in certain circumstances, MRE 410 would apply even when a statement is made without the physical presence of the prosecuting attorney. As a matter of equity, the People cannot disagree based on the current language of MRE 410.” (application for leave to appeal, 44-45).

In *People v Hannold*, 217 Mich App 382; 551 NW2d 710 (1996), the defendant sought to suppress from evidence incriminating statements that he made on the day that he was arrested. Among other factors, the Court of Appeals noted that no prosecuting attorney was present when the defendant made his incriminating statements. *Id.*, 217 Mich App 382, 391. However, the principal factor was that there was no evidence that the defendant had a subjective expectation to negotiate a plea agreement when he made the statements, or that such expectation would have been reasonable under the circumstances. *Id.* The absence of a prosecuting attorney appears not to be the decisive factor in *Hannold* and is thus dicta. In the present case, while no assistant prosecutor was present during the discussions on June 8, 2011, Sergeant Brown took it upon himself to speak for the prosecutor by telling Mr. Smart that he would not get a better plea agreement than the one previously offered by an assistant prosecutor. The purpose of the meeting was, according to Ms. Lazzio, to convey to Mr. Smart that Sergeant Brown had talked to Richmond Riggs and would confirm that Mr. Riggs would not offer a better deal. There was no confusion about whether Sergeant Brown was offering leniency on his own in return for a statement, or whether Sergeant Brown was in fact acting under the direction or authorization of an attorney for the prosecuting authority.

Thus, the totality of circumstances in the present case show that the discussions with Sergeant Brown were made in the process of plea discussions with the prosecuting authority.

The trial judge, Judge Yuille, made an implicit finding of fact that Mr. Smart's expectation that plea discussions would take place was reasonable. On December 12, 2012, the trial court issued an opinion in open court. Among other things, Judge Yuille said that he could not discern a difference between the initiation of the June 8 meeting from that of the first meeting. (tr., 12/12/12, 8; Appendix 274A). Judge Yuille would necessarily have found that Mr. Smart's expectation that plea discussions would take place on June 8 was reasonable in order to suppress

those statements. He was, as the Court of Appeal majority pointed out, slip op 5, well aware of the prosecutor's argument that Mr. Smart's expectation was not reasonable.

Judge Yuille said that Detective Brown might have thought that Mr. Smart was "gaming the system." (tr., 12/12/12, 8; Appendix 274A). However "gaming the system" is not at all inconsistent with a reasonable belief that a better deal was possible.

Mr. Smart may well have believed that by telling Sergeant Brown more than he told him in the first meeting that he would appear to be a more valuable witness and would thus get a better deal. Sergeant Brown's admonition that the deal would not get any better was presumably based on Sergeant Brown's and Richmond Rigg's assessment of the value of Mr. Smart's first account.

Sergeant Brown said that he was instructed by Assistant Prosecutor Richmond Riggs to talk again to Mr. Smart about the homicide. Mr. Smart's attorney, Patricia Lazzio, asked Sergeant Brown to inform Mr. Smart that his plea agreement would not get any better. (tr., 4/12/12, 34-35; Appendix 205A-206A). Sergeant Brown said that he informed Mr. Smart that "the deal wasn't going to get any better" based on information that Sergeant Brown had from the prosecutor's office. (tr., 4/12/12, 36; Appendix 207A). In fact he said that he told Mr. Smart that "... the information I had was that the deal wasn't going to get any better; you can take it or leave it." (tr., 4/12/12, 38; Appendix 209A). Sergeant Brown said that he and Mr. Smart "... talked about the deal on his Carjacking." (tr., 4/12/12, 38; Appendix 209A).

Patricia Lazzio said that the purpose of the second meeting with Sergeant Brown on June 8, 2011 was to have Sergeant Brown tell him that Assistant Prosecutor Richmond Riggs had told Sergeant Brown that Mr. Smart would not get a better deal than the plea agreement that he signed on May 23, 2011. (tr., 4/11/12, 57; Appendix 141A). They met in the evening at the Genesee County jail. (tr., 4/11/12, 57-58; Appendix 141A-142A). Ms. Lazzio told Mr. Smart that he had

to tell Sergeant Brown the entire truth about the homicide because “. . . if you don’t tell the truth, you’re going to get tripped on it, and you’re not going to have a deal.” These were not her exact words, according to Ms. Lazzio, but these words were the sum and substance of what she told Mr. Smart. (tr., 4/11/12, 59; Appendix 143A).

Ms. Lazzio’s advice to Mr. Smart could have been reasonably interpreted by Mr. Smart two different ways. Since his plea agreement required him to testify in the homicide case he should take this opportunity to tell Sergeant Brown the entire truth so that he would not be tripped up when he testified. Or on the other hand her advice could have meant to Mr. Smart that he could indeed get a better deal if he told Sergeant Brown the entire truth. This would cause Sergeant Brown to inform Mr. Riggs that Mr. Smart was a more valuable witness than earlier believed.

In any event Ms. Lazzio’s perception of whether Mr. Smart would get a better deal is not what matters. *People v Dunn*, 446 Mich 409, 415; 521 NW2d 255 (1994) holds that a trial court must apply a two tier analysis with respect to the admissibility of a statement when the defendant invokes MRE 410(4). First, the trial court should determine whether the defendant exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and second, the trial court should determine whether the defendant’s expectation was reasonable given the totality of circumstances. It should be noted that the defendant in *People v Dunn* made his statements before MRE 410 was amended to take up specifically “plea discussions with an attorney for the prosecuting authority.”

During the guilty plea in the carjacking case, Mr. Smart’s original attorney informed the court about the meeting the previous day with Sergeant Brown that was held because of Mr. Smart’s concerns, and that she had spoken to Richmond Riggs the morning of the plea. (tr., 6/9/11, 3; Appendix 48A). She said that there were “two tweaks . . . to the plea agreement, addi-

tional considerations.” (tr., 6/9/11, 3; Appendix 48A). Unfortunately it is not possible to do more than surmise what those tweaks were because they were not clearly stated. From context it appears that the two additional considerations were that the prosecutor would not oppose boot camp and that Mr. Smart would not be charged in the present case if he cooperated in this case and testified truthfully, which the prosecutor thought would be “consistent with what he’s said already.” (tr., 6/9/11, 3-4; Appendix 48A-49A). The trial judge made it clear that he would decide for himself whether or not Mr. Smart would get boot camp. (tr., 6/9/11, 3; Appendix 48A).

For several reasons this shows that plea negotiations were ongoing as of June 8, 2011. First, whether or not Mr. Smart was able to obtain additional concessions from the prosecutor or whether or not the trial court would accept any sentencing recommendations from the prosecutor, Mr. Smart was engaged in plea negotiations. There was clearly a dialogue among Sergeant Brown, Richmond Riggs and Mr. Smart’s attorney over June 8 and June 9 and the prosecutor was directing the negotiations. Secondly, it appears that it was not until June 8 that Sergeant Brown believed that Mr. Smart was giving him a truthful account of what had happened. The prosecutor would not have had any interest in his testimony if the prosecutor did not believe that he was truthful.

II. THE DEFENDANT WAS IN CUSTODY WHEN THE JUNE 8, 2011 STATEMENT WAS MADE AND THE STATEMENT SHOULD BE SUPPRESSED BECAUSE HE WAS NOT ADVISED OF HIS RIGHTS PURSUANT TO MIRANDA v ARIZONA.

Standard of Review: A trial court’s factual findings in a ruling on a motion to suppress are reviewed for clear error. *People v Elliott*, 494 Mich 292, 300; 833 NW2d 284 (2013). To the extent that a trial court’s ruling on a motion to suppress involved an interpretation of law or the application of a constitutional standard, review is de novo. *People v Elliott*, supra, 494 Mich 292,

300-301. Whether a court applied the correct constitutional standard is reviewed de novo. *Id.* Whether a person is in custody for purposes of *Miranda* is a mixed question of law and fact that must be answered independently after a de novo review of the record. *People v Cortez (on remand)*, 299 Mich App 679; 832 NW2d 1, 6 (2013). A trial court's factual findings regarding the circumstances surrounding the giving of the statement are reviewed for clear error. *Id.*

In *People v Elliott*, supra, the central issue was whether a parole officer was required to give *Miranda* warnings to a person in jail on a parole violation hold. Unless the defendant were in custody, it would not have mattered whether a parole officer was required to give *Miranda* warnings to the defendant because neither she nor a police officer would have been required to give *Miranda* warnings to the defendant. The Court of Appeals had held that the defendant was in custody and that the parole officer was required to give *Miranda* warnings. The Supreme Court reversed this decision and held both that the defendant was not in custody and that the parole officer, who was not the defendant's own personal parole officer, was not required to give *Miranda* warnings. *People v Elliott*, supra, 494 Mich 292, 322.

This Court in *People v Elliott*, consistently with *Howes v Fields*, 565 US ____; 132 S Ct 1181; 182 L Ed 2d 17 (2012) looked to the totality of circumstances in that particular case rather than hold that a person in jail or prison for a certain offense is in all cases not in custody for any other offense. The circumstances of the present case are quite different from those in *People v Elliott*. This Court [*People v Elliott*, supra, 494 Mich 292, 314] held that Elliott was in fact already a prisoner, not merely a pretrial detainee, citing *People v Holder*, 483 Mich 168, 172-173; 767 NW2d 423 (2009): "A paroled prisoner is not considered released; rather, the prisoner is simply permitted to leave the confinement of prison." and MCL 791.238(1): "Each prisoner on parole shall remain in the legal custody and under the control of the department." and MCL 791.238(2): "A prisoner violating the provisions of his or her parole and for whose return a war-

rant has been issued by the deputy director of the bureau of field services is treated as an escaped prisoner. . .”

In the present case, Mr. Smart was a pretrial detainee, not a sentenced prisoner. Mr. Smart was not “living in jail” and we have the additional factor that Mr. Smart expected that some favorable consideration would result from his interview with Sergeant Brown.

The Court of Appeals recently decided *People v Cortez (on remand)*, supra. The Court of Appeals had been directed by the Supreme Court to reconsider its original published opinion, *People v Cortez*, 294 Mich App 481; 811 NW2d 25 (2011) in light of *Howes v Fields*, supra, and *People v Cortez (on remand)* deals extensively with the application of that case to interrogation of prisoners.

The defendant in the *Cortez* case was incarcerated at the Carson City Correctional Facility serving a sentence. He was questioned about two shanks that were found in his cell without benefit of *Miranda* warnings. Applying the factors set forth in *Howes v Fields*, the Court of Appeals held that the defendant was not in custody and that it was not necessary to give him *Miranda* warnings. *People v Cortez*, supra, slip op. 10.

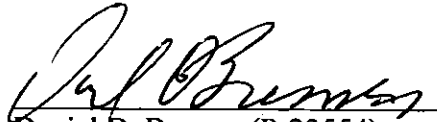
People v Cortez is limited to its own facts, as is *People v Elliott*. The *Howes v Fields* factors would still weigh in Mr. Smart’s favor.

RELIEF REQUESTED

For the above reasons, Defendant-Appellee asks that the Supreme Court deny the prosecutor's application for leave to appeal.

Respectfully submitted,

Dated: May 12, 2014

A handwritten signature in black ink, appearing to read 'Daniel D. Bremer', written over a horizontal line.

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